the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the Court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case. Where other factors appear to be evenly balanced it is a Counsel of prudence to take such measures as are calculated to preserve the *status quo*.

Consequently, it was my finding that there was a serious question to be tried and, guided by the relevant authorities on this point, the balance of convenience certainly lay in favour of the plaintiffs. I had accordingly dismissed the defendants' application with costs but they were given the liberty to apply for security for costs if they thought it necessary in the circumstances.

LAM ENG RUBBER FACTORY (M) SDN. BHD.

v.

STATE DIRECTOR, KEDAH & ANOR.

HIGH COURT, ALOR SETAR
DATO' K.C. VOHRAH J.
[ORIGINATING MOTION NO. 32-33-1987]
1 JULY 1993

LAND LAW: Appellant applied for land to be converted from agricultural to industrial - Application rejected by second respondent - Notice given to demolish old factory on land and replanted with rubber - Appellant appealed under s. 418 of the National Land Code - To quash notice to remedy breach of condition pursuant to s. 128 NLC issued by respondents - To quash decision made under s. 124 NLC of 1st respondent - Whether applicant breached condition when rubber factory built on land - Whether s. 110(a) NLC applicable - Whether subject to implied conditions - Sections 53 & 115 NLC - Whether direction to demolish factory and plant rubber trees valid.

DECLARATION: Whether declaration can issue - To nullify s. 128 NLC notice - Whether contravened Article 13 and 18 of Constitution and s. 53 of NLC for non-compliance of natural justice - Whether prayer for declaration in appeal application proper - Section 418 NLC - Order 55 r. 13 & O. 15 r. 16 RHC 1980.

The applicant company is the current owner of a piece of land which formed part of a bigger rubber estate. On the said land was a factory which the applicant claimed was built at least in 1940 but the respondents claimed was built in 1970. In 1983 applicant applied for conversion of the category of land use of the said land from "agricultural" to "industrial" under the NLC. The application was rejected the second respondents gave notice in Form 7A under s. 128 of the NLC to demolish the factory within 3 months and to plant rubber trees on the said land within that period.

The applicant appealed under s. 418 of the NLC to quash the notice to remedy a breach of condition under s. 128 of NLC issued by the 2nd respondent and to quash decision of 1st respondent made under s. 124 of the NLC in rejecting the applicant's application. The applicant also applied for the suspension of the operation of the notice until the end of the present proceedings and for an order that the application for variation of the category of land use be remitted for re-hearing and determination.

The applicant further applied for a declaration that the notice sent rejecting the applicant's application for conversion was null and void in contravention of Articles 13 and 18 of the Federal Constitution and of s. 53 of the NLC for non-compliance of the rules of natural justice.

Held:

[1] The applicant by way of originating motion had mixed the appeal which is a right under s. 418 of the NLC with an alien matter of a prayer for declaratory relief under O. 15 r. 16 RHC which should be begun by writ or originating summons and as such it is not proper.

[2] The NLC has prescribed an exclusive mode for an aggrieved party to challenge the decision of the State Director, Registrar or Land Administrator under s. 418 and the aggrieved party has to abide by the procedure therein prescribed. As such the prayer requesting for a declaratory judgment is misconceived and fails *in limine*.

[3] The prayer against the 1st respondent, the State Director, purported under s. 418 of the NLC is ignored as the decision to refuse the application for conversion of land use was made not by the 1st respondent but the State Authority. Section 418 of the NLC does not provide that the decision of the State Authority may be appealed against.

[4] The appeal under s. 418 of the NLC against the directions specified in the notice issued by the second respondent to the applicant to remedy the purported breaches of express condition attached to the land can be considered as under s. 418(3) of the NLC "decision" includes "any direction".

[5] As the words "for use as rubber estate" in Jawi appearing on the title expressly show that land is to be used as rubber estate, s. 110(a) of the NLC applies to the said land. The non-existence of rubber trees on the said land clearly shows it is not used as a rubber estate and thus the direction contained under the notice issued pursuant to s. 128 of the NLC to plant rubber trees is a valid direction.

[6] As there is no express prohibition of the erection of building or factory in the grant or under the special conditions the structure being a rubber processing factory is not a breach of the express condition and the direction by the 2nd respondent to demolish the said building is invalid and is set aside.

[7] As the application contained a number of irrelevant matters and misconceived prayers and the appeal succeeded in only one prayer the applicant is awarded only half the cost of the application.

[Appeal allowed in part. Applicant awarded half costs of the application].

Cases referred to:

Puntar v. Ministry of Pension and National Insurance [1963] 1 All ER 275 ***(refd)***

Lim Cho Hock v. Speaker, Perak State Legislative Assembly [1979] 2 MLJ 85 ***(refd)***

Manggai v. Government of Sarawak [1970] 2 MLJ 41 ***(refd)***

Land Executive Committee of Federal Territory v. Syarikat Harper Gillfillan Bhd. [1981] 1 MLJ 234 ***(refd)***

Development and Commercial Bank Bhd. v. Land Administrator, Wilayah Persekutuan [1991] 2 MLJ 180 ***(refd)***

Garden City Development Bhd. v. Collector of Land Revenue [1982] 2 MLJ 98 ***(refd)***

Collector of Land Revenue, Johor Bahru v. South Malaysia Industries Bhd. [1978] 1 MLJ 130 ***(dist)***

Legislation referred to:

Federal Constitution, Articles 13 and 18

National Land Code 1965, ss. 52, 53(2), 110(a), 115(1)(a), (4)(b), (c), (d), 117, 124, 128, 418(1), (2), (3)

Rules of the High Court 1980, O. 5 r. 4, O. 15 r. 16, O. 55 r. 13

For the appellant - Tan Kah Hoo; M/s. Gan Teik Chee & Co.

For the respondents - Hasan bin Lah, State Legal Advisor

JUDGMENT

K.C. Vohrah J:

Lam Eng Rubber Factory (M) Sdn. Bhd., the applicant company, is presently the registered owner of a piece of land, Lot 1217, Surat Putus Kecil 3124, Mk. Sungei Pasir, Sungei Petani, Kedah. The former title to this land was Surat Putus Besar 22720 but Surat Putus Kecil 3124, the present title, shows that on 21 Muharram 1370 (1 November 1950) the land was granted to one Lim Seng Tiew for use as a rubber estate.

Background:

On the said land stands a rubber processing factory (the factory) which the applicant company claims was built at least in 1940 but which the respondents claim was built in 1970. My view is that it was already in existence in 1940,

when the said land was part of a bigger area of land planted with rubber and that on this bigger area not only was the said factory but other ancillary buildings like a smokehouse and workers' quarters had been built thereon (see uncontradicted paragraph 9 appearing in affidavit of Yeoh Soon Lin affirmed on 15 March 1993 - Enclosure 38).

In November 1983 the applicant company applied for conversion of the said land from category of land use "rubber" to category of land use "industrial" under the National Land Code (the NLC). In 1987 the application for conversion was rejected by the State Authority. And the 2nd respondent by letter dated 2 August 1987 gave notice in Form 7A to the applicant company under s. 128 of the NLC to demolish the factory on the said land within 3 months from the date of the notice and to plant rubber trees on the said land within the said period.

Nature of application

The applicant company in its appeal under s. 418 of the NLC has applied for the following:

> 2. An order quashing the said notice to remedy a breach of condition pursuant to s. 128 of the National Land Code 1965 issued by the 2nd respondent and a decision of the 1st respondent made pursuant to s. 124 of the National Land Code 1965 rejecting the applicant's application for variation of category of land use from rubber to industrial of Lot 1217 Mukim of Sungei Pasir, District of Kuala Muda, State of Kedah comprised in SPK 3124; or in the alternative
> 3. an order suspending until final determination of these proceedings the operation of the notice to remedy a breach of the condition pursuant to s. 128 of the National Land Code 1965;
> 4. an order that the matter of a notice to remedy a breach of condition pursuant to s. 128 of the National Land Code 1965 dated 2 August 1987 and made by the 2nd respondent and a decision of the 1st respondent pursuant to s. 124 of the abovementioned Code notified by letter dated 2 August 1987 rejecting the applicant's application for variation of category of land use from rubber to industrial of Lot 1217 Mukim of Sungei Pasir, District of Kuala Muda, State of Kedah comprised in SPK 3124 may be remitted to the 1st respondent for re-hearing and determination, together with the opinion or directions of the Court according to law.

In addition, in the same application, the applicant company has applied for a declaration that the notice sent to the company and the rejection of the application for conversion of the land are null and void for being in contravention of Articles 13 and 18 of the Federal Constitution and of s. 53 of the NLC and for non compliance with the rules of natural justice.

Prayer for declaration in appeal application not proper

The matter properly before the Court is an appeal pursued under the provisions of s. 418 of the NLC read with O. 55 r. 13 of the Rules of the High Court (the RHC) and is by way of originating motion. What the applicant has done in the appeal is to mix the appeal, which is a right given by a statutory provision (s. 418 of the NLC), with an alien matter, a prayer for declaratory relief under O. 15 r. 16 RHC which should have been begun either by writ or originating summons (see O. 5 r. 4 and also *Puntar v. Ministry of Pension and National Insurance* [1963] 1 All ER 275 and *Lim Cho Hock v. Speaker, Perak State Legislative Assembly* [1979] 2 MLJ 85) and that is not proper. But more importantly, the NLC has prescribed an exclusive mode to an aggrieved party to challenge the decision of the State Director, Registrar or Land Administrator under s. 418 and the aggrieved party has to abide by the procedure prescribed for him (*Manggai v. Government of Sarawak* [1970] 2 MLJ 41 and *Land Executive Committee of Federal Territory v. Syarikat Harper Gillfillan Bhd.* [1981] 1 MLJ 234; see also *Development and Commercial Bank Bhd. v. Land Administrator, Wilayah Persekutuan* [1991] 2 MLJ 180). In the circumstances the prayer requesting for a declaratory judgment is misconceived and fails *in limine*.

No right of appeal against decision of State Authority under s. 418 NLC

Let me deal with the appeal of the applicant company which arises under s. 418 of the NLC. It reads:

> 418(1) Any person or body aggrieved by any decision under this Act of the State Director, the Registrar or any Land Administrator may, at anytime within the period of three months beginning with the date on which it was communicated to him, appeal therefore to the Court.
> (2) Any such appeal shall be made in accordance with the provisions of any written law for the time being in force relating to civil procedure; and the Court shall make such order thereon as it considers just.

(3) In this section "decision" includes any act, omission, refusal, direction or order.

I noticed from the affidavit of the Assistant Land Administrator affirmed on 6 September 1989, Enclosure 13, that the refusal to convert the category of land use was made by the State Authority of Kedah on 21 May 1987. Section 418 does not provide that the decision of the said State Authority may be appealed against. In the circumstances I will ignore the prayer in the appeal relating purportedly to the refusal of the 1st respondent to convert the category of land use of the applicant company's land as it was not the 1st respondent's decision but that of the State Authority; and I shall only deal with the appeal raised under s. 418 against the directions specified in the notice issued by the 2nd respondent to the applicant to remedy purported breaches of an express condition attached to the land, bearing in mind that under s. 418(3) "decision" includes, *inter alia*, "any direction".

Issues

To come back to the matter of the notice. The notice in Form 7A directed the respondent company, it will be recalled, to demolish the factory standing on the land within 3 months and to start planting rubber on the said land within the same 3 months from the date of the notice. Now, the respondents allege that "the rubber processing factory standing on the said land was built without the permission of the State Authority" and that "the non-existence of any rubber tree on the said land constituted a breach of the condition of the land in question" (see paragraphs 6 and 8 of the affidavit of the Assistant Land Administrator, Enclosure 13).

The issues are whether there was an express condition attached to the land and if so, whether there was a breach when the factory was found built thereon and when rubber trees are not in existence thereon.

It will be recalled that in the Surat Putus Kecil the use of the land was put as "Rubber Estate" ("Kebun Getah"). Did the applicant company breach a condition attached to the land when the factory was built thereon and rubber trees were not in existence on the land?

The respondents say the land was granted for use as a rubber estate and this express condition had been breached.

Land alienated before commencement of NLC subject to express condition - s. 110(a)

Under s. 110(a) of the NLC it is provided, *inter alia*, that land alienated before the commencement of the Act (the NLC) shall be subject to "such express conditions and restrictions in interest (if any) as, immediately before the commencement, were endorsed on the document of title thereto (or, in the case of a certificate of title, referred to therein)."

Land alienated before commencement of NLC not subject to express condition but subject to implied conditions - ss. 53 and 115.

On the other hand, if the land alienated before the commencement of the NLC is not subject to an express condition then by virtue of s. 53 NLC if the land is, *inter alia*, one of the 3 types of land categorised in s. 53(2) (as the subject land is) it is subject to an implied condition that it shall be used for agriculture purposes only and consequently other implied conditions under s. 115(1) shall apply to it. Section 115(1)(a) provides that no building shall be erected on the land other than building or buildings to be used for one or more of the purposes specified or referred to in sub-section (4). Counsel for the appellant company says that the purposes spelt out in paragraphs (b) and (c) in sub-section (4) are relevant to show that the factory is legitimately standing on the land; paragraph (c) states the purpose as that of extracting or processing raw material from any agriculture produce and paragraph (d) states the purpose as that of preparing for distribution, *inter alia*, such material or produce.

Is there an express condition

Respondents' Counsel, the learned Legal Adviser, argues that there is an express condition in the title as when the land was granted the express condition of the land was shown as "for use as Rubber Estate."

I reproduce below the Court interpreter's official translation of the land title from Jawi -

Government of Kedah

Surat Putus Kecil

.....
Seal of H.R.H. Sultan

Grant No. **3124**
District of **Kuala Muda** Mukim **Sungai Petani**

Let it be known by these presents that His Royal Highness the Sultan of the State of

Kedah Darulaman hereby grants subject to the provisions and conditions contained in Act No. 56 (land) unto **Lim Seng Tiew.**

All that piece of land situate in the **Mukim of Sungai Pasir Daerah Sungai Pasir** being portion No. **1217** and containing by measurement an area of **6** relongs **201** jemba **00** square feet or thereabout, which said piece of land with its measurements and portions is delineated in the plan drawn in these presents, the said plan being copied from Plan No. **16795** filed in the office of the Superintendant of Surveys of the State of Kedah and ownership is given to **Lim Seng Tiew** to hold forever for use as **Rubber Estate (Kebun Getah)** and that the quit rent is at present fixed at RM4.90 which could be amended in accordance with the provisions and conditions of Act No. 56 (land) and further this land grant is subjected to the said Act too and also to the special conditions stated below

Special Conditions

- Nil -

Registered under the Command and Seal of H.R.H. Sultan at the office of Land Officer **Kuala Muda** on **21 Muharram 1370.** No. of Former Title **Surat Putus Besar 22720.** This Surat Putus Kecil is issued on **16th** of **4 1370.** Despatch Book Registration No. **59/70.**

sgd.
illegible
.....
Land Officer

Counsel for the appellant company argues that the words appearing in the land title "for use as Rubber Estate" are merely "words of description" and do not show that an express condition was endorsed in the title. He relied on the case of *Garden City Development Bhd. v. Collector of Land Revenue* [1982] 2 MLJ 98 where the Judicial Committee of the Privy Council (the Board) was of the view that the presence of the words "Lease for Agriculture Land" appearing in the lease of a piece of land could not in itself have the effect of imposing a condition of use for agriculture only. The Board had earlier found that the words in capital letters appearing on top of the first page of the lease gave the impression of having been printed by a rubber stamp, applied somewhat unevenly and the nature of the printing was different from that contained in the body of the lease. The Board then examined 9 conditions contained in the lease and found none of them making any specific reference to agriculture or agricultural use and concluded that it was not possible to infer an intention to restrict the use of the land to agriculture.

In the case under review the words "for use as Rubber Estate" in Jawi appearing in the title are words found within the body of the grant and they clearly and expressly show that the land is to be used as a rubber estate; the express condition in the title is that the land is to be used as a rubber estate. And therefore s. 110(a) of the NLC applied to the said land not s. 53 read with s. 115; thus the said land which was alienated before the commencement of the NLC is still subject to the express condition that the land is for use as a rubber estate.

Validity of direction to plant rubber trees

The said land being subject to the express condition that the land is for use as a rubber estate the non existence of rubber trees on the said land shows it is not used as a rubber estate and there is a breach of the express condition and therefore the direction contained in the notice issued under s. 128 of the NLC to the appellant company to plant rubber trees on the said land within 3 months from the date of the notice is a valid direction.

Validity of direction to demolish factory

As regards the existence of the factory on the said land I am satisfied, on the balance of probabilities, on the basis of the statements of Yeoh Soon Lim in his affidavit (Enclosure 2) affirmed on 9 October 1987, and the survey plan completed in 1940 referred to in the affidavit, that the factory, or at least the basic structure of the factory, existed in 1940. Is its continued existence on the land a breach of the express condition to use the land as a rubber estate? It will be noted that there is no express provision prohibiting the erection of a building or factory, none in the body of the grant nor under the heading "Special Conditions" (which in fact has the entry "- Nil -"). This is unlike the situation in *Collector of Land Revenue, Johor Bahru v. South Malaysia Industries Bhd.* [1978] 1 MLJ 130 where a special condition in a lease which stated the land was to be used solely for the erection of a factory was found by the Federal Court to have been breached when part of the factory was used as a store. The Court held that this condition and another express condition which was in regard to the restriction of user to light industry imposed an imperative obligation

on the respondent to use the factory for light industry and that being the inherent limitation as to user, storing of industrial chemicals and fertilisers was not a legitimate purpose of user permitted under the lease, and that the use of part of the factory premises for an alien and totally unconnected industrial project was inconsistent with the express condition in the lease. It will be noted the Court construed the express conditions in the light of the land being alienated (after the commencement of the NLC) under the category "industry" (s. 52 of NLC) and it therefore being subject to the implied conditions (so long as they were not inconsistent with the express conditions) of s. 117 of the NLC. As I had pointed out earlier, the land in our case was alienated before the commencement of the NLC with an express condition and is therefore subject to s. 110 and not s. 53 relating to the importation of an implied condition of use for agricultural purposes only and not also to s. 115 relating to implied conditions for agricultural use. What is expressed in the land in the instant case is that it be used for a rubber estate and there is no express prohibition against setting up a rubber processing factory. As I see it, the setting up of workers' quarters, a house for the owner of the land, a smokehouse and a building for the processing of rubber produce are necessary incidents of land being used as a rubber estate - in fact these are ubiquitous in the rubber estates in Kedah that can be found along country roads - and to say that a rubber processing factory erected on the said land runs counter to the express provision for its use as a rubber estate is clearly not right. Thus there has been no breach of the express condition and the direction given by the 2nd respondent to demolish the factory is invalid.

In the premises this Court

(i) holds that the prayer for a declaration and the appeal against the refusal of the State Authority to convert the user of the land fail *in limine*;

(ii) sets aside the direction contained in the Form 7A notice issued by the 2nd respondent on 2 August 1987 to the appellant company to demolish the rubber processing factory;

(iii) affirms the direction given in the said notice to the appellant company to plant rubber trees within 3 months from the date of the notice save that the period of 3 months shall begin from today.

Since this application has contained a number of irrelevant matters and misconceived prayers and the appeal has succeeded only on one prayer the applicant company is awarded half the costs of the application.